120 FERC ¶ 61,261
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

NSTAR Electric Company Docket No. EL07-81-000

v.

ISO New England, Inc.

ORDER DENYING COMPLAINT

(Issued September 21, 2007)

1. On July 9, 2007, NSTAR Electric Company (NSTAR) filed a complaint against ISO New England, Inc. (ISO-NE) concerning the interrelationship of Hydro Québec Interconnection Capacity Credits (HQICCs) and capacity imports that may bid into the Forward Capacity Market (FCM) during the transition period from the current installed capacity (ICAP) market to the FCM. In this order, the Commission denies the complaint.

## Background

2. The HQ Interconnection is a direct current transmission line that connects Québec, Canada and the New England region. The owners of the HQ Interconnection recover their costs through agreements with sponsoring load-serving entities called Interconnection Rights Holders. The agreements allow Interconnection Rights Holders to use a share of the HQ Interconnection in direct proportion to each holder's financial support. The New England Power Pool (NEPOOL) allocated capacity credits to Interconnection Rights Holders in proportion to their individual rights in the form of HQICCs. NSTAR is an Interconnection Rights Holder.

3. On June 16, 2006, the Commission approved a contested settlement accepting a proposal by ISO-NE to create the FCM (FCM Settlement).[1] The FCM Settlement established a transition period prior to the first commitment period of the FCM, scheduled to begin June 1, 2010. The FCM Settlement provided that the HQ Interconnection Transfer Capability is to be fixed during the transition period at 1,800 MW and the HQICCs are to be fixed at 1,200 MW.[2] The settlement also stated that during the transition period the difference or delta between these two amounts, 600 MW, "may be used for [Unforced Capacity (UCAP)] over the Phase I/II interconnection by any supplier that arranges for transmission over the interconnection without reductions in the HQICCs." Further, should capacity imports exceed 600 MW during the transition period, the settlement stated that it "will result in reductions in HQICCs as provided for under current procedures" and "only the remaining HQICCs will receive payments."[3] On September 1, 2006, ISO-NE and NEPOOL made a filing implementing the transition provisions of the FCM Settlement. The Commission accepted the transition provisions on October 31, 2006.[4]

4. On February 15, 2007, ISO-NE filed revisions to Market Rule 1 to implement the FCM Settlement.[5] In its February 15 filing, ISO-NE proposed a tariff provision to be effective after the transition period, *i.e.*, during the subsequent implementation phase, that would reduce HQICCs when the HQICCs are displaced by actual capacity sales over the HQ Interconnection above the "HQI Excess," *i.e.*, the total available capacity of the line minus the value of extant HQICCs. In an order issued April 16, 2007, we directed ISO-NE, for the implementation phase, to place a cap on the amount of import capacity contracts accepted in the auction over the HQ Interconnection.[6] We required that cap to equal the HQI Excess, so that if for example the capacity of the line was 1,800 MW, and

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[1] *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (June 16 Order), *order on reh'g*, 117 FERC ¶ 61,133 (2006).

[2] FCM Settlement § 11, Part VII.K.

[3] *Id.*

[4] *ISO New England Inc. and New England Power Pool*, 117 FERC ¶ 61,132 (2006) (October 31 Order), *order on reh'g*, 119 FERC ¶ 61,044 (2007).

[5] *See* ISO-NE, February 15, 2007 Filing, Docket No. ER07-546-000.

[6] *ISO New England, Inc.*, 119 FERC ¶ 61,045, *order on reh'g*, 120 FERC ¶ 61,087 (2007) (April 16 Order).

1,400 MW of that capacity was allocated to HQICCs granted to the Interconnection Rights Holders, ISO-NE could only accept 400 MW of import capacity contracts in the auction. Thus, as a result of our ruling, the practice followed during the transition period of reducing HQICCs for capacity sales above the HQI Excess over the HQ Interconnection would terminate at the end of the transition period.[7]

**Complaint**

5. NSTAR requests that the Commission require ISO-NE to revise sections I.2.2(o) and III.8.3.7.2.1(e) of the ISO-NE tariff implementing the transition rules of the FCM Settlement relating to HQICCs. It asserts that, as interpreted by ISO-NE, these sections of the ISO-NE tariff violate the Commission's established policy of netting HQICCs.

6. NSTAR notes that the April 16 Order directed ISO-NE to eliminate the proposed HQICC netting methodology when implementing the FCM in the later implementation phase. NSTAR maintains that the same standard should be applied during the earlier transition period. The Commission's allowing a netting provision during the transition period, according to NSTAR, violates the rights approved for the FCM during the transition period.

7. That is, NSTAR asserts that the HQICC netting provisions in the ISO-NE tariff for the transition period violate the contractual rights of the Interconnection Rights Holders by transferring the benefits of the HQICCs to third parties without compensating the Interconnection Rights Holders. NSTAR argues that if all HQICCs were displaced by capacity imports over the entirety of the transition period, end-use customers would suffer injury in the amount of over $125 million.

8. Further, NSTAR asserts that the HQICC provisions for the transition period are contrary to prior Commission orders.[8] NSTAR contends that the Installed Capacity Requirement Order held that the amount of tie capacity available for capacity import contracts is the difference between the total capacity and the amount of capacity credits afforded to the entities that financed the interconnection. NSTAR states that in the Installed Capacity Requirement Order the Commission held that, where New England loads jointly share the costs of transfer capability, loads should jointly share the benefits

[7] April 16 Order, 119 FERC ¶ 61,045 at P 167, *order on reh'g*, 120 FERC ¶ 61,087 at P 77 (2007).

[8] NSTAR July 9, 2007 Complaint at 10, *citing ISO New England, Inc.*, 118 FERC ¶ 61,157 (2007) (Installed Capacity Requirement Order).

of the tie benefits and the associated reduction in installed capacity requirements. However, according to NSTAR, the ISO-NE tariff does not allocate the full tie benefit of the HQ Interconnection to the Interconnection Rights Holders, because ISO-NE would accept capacity import contracts up to the total capacity of the HQ Interconnection and would then reduce HQICCs to the extent that capacity import contracts exceeded the difference between the HQ Interconnection's capacity and HQICCs. Therefore, NSTAR asks the Commission to modify the ISO-NE tariff so that the maximum amount of import capacity offered over the HQ Interconnection for the transition period as well as the subsequent implementation phase is limited to the total available capacity of the line, minus the value of extant HQICCs.

9. Further, NSTAR asserts that its proposal does not violate the terms of the FCM Settlement and would not require a "public interest" showing pursuant to the *Mobile-Sierra* doctrine.[9] NSTAR states that this argument was also raised on rehearing of the April 16 Order.[10] NSTAR argues that its proposal is consistent with the FCM Settlement because the settlement requires that HQICCs be reduced on a MW-for-MW basis "only if" the amount of capacity sold exceeds the excess capacity and that the Commission limited the amount of capacity contracts to those that can be accommodated without reducing HQICCs in the April 16 Order.[11] NSTAR further maintains that the settlement does not bind the parties from limiting the amount of imports over the tie line. According to NSTAR, the FCM Settlement requires that the sum of capacity contracts and HQICCs not exceed the transfer limit. By limiting the amount of capacity contracts to those that can be accommodated without reducing HQICCs, NSTAR asserts that the proposed revision to the ISO-NE tariff accomplishes exactly what the FCM Settlement requires. NSTAR maintains that the provision of Part III.B.3.b of the FCM Settlement allowing reduction of HQICCs only applies if capacity contracts exceed the HQI Excess, but the settlement does not prohibit limiting the capacity.

10. NSTAR also argues that section III.8.3.7.2.1(e) of the ISO-NE tariff does not prohibit the tariff revisions proposed by NSTAR. According to NSTAR, this section only states that UCAP above the 600 MW cap may be transmitted and that HQICCs

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[9] *See United Gas Pipe Line Co*. v. *Mobile Gas Service Corp*., 350 U.S. 332 (1956); *Federal Power Commission* v. *Sierra Pacific Power Co*., 350 U.S. 348 (1956).

[10] NSTAR July 9, 2007 Complaint at 11, *citing* HQUS May 16, 2007 Request for Rehearing, Docket No ER07-546-001.

[11] NSTAR July 9, 2007 Complaint at 12, *citing* section 11, Part III.B.3.b of the FCM Settlement.

would only be reduced if the cap is exceeded. Moreover, NSTAR maintains that the April 16 Order, prohibiting the netting of HQICCs, supersedes any terms of the FCM Settlement to allow otherwise.

11. NSTAR anticipates that protestors will claim that the tariff practice of reducing HQICCs when displaced by capacity sales over the HQ Interconnection has been in place and that the FCM Settlement carries this practice forward. However, NSTAR maintains that no such practice exists. NSTAR asserts that the tariff language permitting HQICC reductions due to imports from third parties was inserted into the ISO-NE tariff to prevent double counting of HQICCs and capacity contracts above HQI Excess toward meeting reliability obligations.[12] NSTAR maintains that the original tariff provision was not designed to require that capacity contracts above the HQI Excess be allowed to infringe on HQICC entitlements, but was created to acknowledge that there is a potential for double counting so long as there are capacity contracts on a transmission facility that already has its reliability benefits expressed in the form of HQICCs.

12. Finally, NSTAR asserts that the original tariff provision did not have any practical impact because New England was long on installed capacity and, pursuant to the preexisting capacity pricing regime, capacity had a *de minimus* market value. Therefore, NSTAR argues, the "confiscatory aspects" of the preexisting rule were never an issue.[13] With the change in the capacity market, NSTAR maintains that the possibility that the preexisting HQ import rule would result in forfeiture of HQICCs became real and requires that the rules governing HQ imports be comparable with the rules governing the other ties into New England as established in the April 16 Order. Therefore, NSTAR asks the Commission to require ISO-NE to revise its tariff provisions related to the transition period to comport with the policy prohibiting reduction of HQICCs.

**Notice and Responsive Pleadings**

13. Notice of the complaint was published in the *Federal Register*, 72 Fed. Reg. 39,398 (2006), with the answer and interventions due on or before July 30, 2007. ISO-NE and the NEPOOL Participants Committee filed timely motions to intervene and answers. The Connecticut Department of Public Utility Control filed a notice of intervention. The Attorney General of Massachusetts (Attorney General), H.Q. Energy Services (U.S.), Inc. (HQUS) and IRH Management Committee (IRH Committee) filed motions to intervene and comments. Mirant Energy Trading Company, Mirant Canal,

[12] *See* section I.2.2(o) of the ISO-NE Tariff.

[13] NSTAR July 9, 2007 Complaint at 15.

LLC, and Mirant Kendall, LLC (collectively Mirant); PPL EnergyPlus, LLC and United Illuminating Company filed motions to intervene. Northeast Utilities Service Company, on behalf of the NU Companies (Northeast Utilities) filed a motion to intervene one day out of time. On August 17, 2007, NSTAR filed an answer to ISO-NE's and NEPOOL's answers and HQUS' comments. On August 31, 2007, ISO-NE and NEPOOL filed an answer to NSTAR's answer.

14. ISO-NE, HQUS and NEPOOL contend that NSTAR's proposal to provide that UCAP above 600 MW may not be transmitted over the HQ Interconnection during any month clearly conflicts with the plain language of section 11, Part VIII.K of the FCM Settlement, which explicitly allows the purchaser of transmission to reduce HQICCs on a MW-for-MW basis by bringing capacity into New England.[14] ISO-NE argues that NSTAR ignores the structure of the FCM Settlement and commingles provisions relating to FCM implementation with those relating solely to the transition period. According to ISO-NE, to support its claim that the FCM Settlement does not bind the parties from limiting the amount of imports over the line, NSTAR quotes section 11, Part III.B.3.b, which applies only to the FCM auction, not the transition period.

15. ISO-NE maintains that the clear intent of the FCM Settlement was to acknowledge, allow, and address situations in which sold capacity exceeds the excess capacity on the HQ Interconnection, otherwise the parties would not have needed to include language addressing situations in which the remaining 600 MWs of capacity is oversubscribed. Further, ISO-NE maintains that NSTAR is essentially stating that it "should be free to modify any agreement or tariff in any way that the agreement or tariff might theoretically not specifically prohibit."[15] ISO-NE asserts that if this claim is tolerated, no tariff or settlement would be safe from endless interference. ISO-NE also states that, in this case, the FCM settlement negotiations were contentious, lengthy and involved difficult issues.[16] ISO-NE states that the FCM Settlement Agreement "should be honored" because difficult compromises were made among diverse parties and the end result ended protracted litigation and brought a measure of stability to the New England market.[17]

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[14] FCM Settlement § 11, Part VIII.K.

[15] ISO-NE July 30, 2007 Answer at 15.

[16] *Id.* at 15, *citing* June 16 Order, 115 FERC ¶ 61,340 at P 66.

[17] *Id.*, *citing* June 16 Order, 115 FERC ¶ 61,340 at P 66.

16. Further, ISO-NE and HQUS argue that the April 16 Order is inapplicable to the FCM transition period because it applies only to implementation and operation of the FCM.[18] According to ISO-NE, the April 16 Order does not reference section 11, part VIII.K of the FCM Settlement and does not disturb the transition period rules accepted in the October 31 Order. It states that, under the FCM Settlement and the June 16 Order approving the settlement, transition payments are a separate component of the settlement. Further, ISO-NE claims that the October 31 Order makes clear that the transition payments are just one part of the overall package represented by the settlement and the April 16 Order makes clear that it was only addressing rules for the implementation phase of the FCM. Further, both ISO-NE and NEPOOL maintain that the implementation phase of the FCM is intended to be "substantially different" from the transition period.[19]

17. ISO-NE, NEPOOL and HQUS also assert that NSTAR's request is an impermissible collateral attack on the FCM Settlement and the transition period rules.[20] ISO-NE notes that the language that NSTAR seeks to modify was approved by the Commission twice: once as part of the FCM Settlement in the June 16 Order and again when it was implemented in the October 31 Order. ISO-NE, NEPOOL and HQUS note that NSTAR did not challenge the HQICC provision in either the FCM Settlement proceeding or the proceeding approving the transition rules. NEPOOL further notes that NSTAR objected to other portions of the FCM Settlement. ISO-NE maintains that the Commission's policy against relitigation of settled issues has been applied with particular force in matters of market structure.[21] According to ISO-NE, NSTAR has not alleged any changed circumstances since the Commission issued the June 16 and October 31 Orders that would render section 11, part III.K of the FCM Settlement and the relevant market rules no longer just and reasonable.

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[18] *See*, *e.g.*, *id.* at P 16-18; April 16 Order, 119 FERC ¶ 61,045 at P 167 ("[T]he maximum amount of import capacity contracts *accepted in the auction* over the HQ Interconnection should be limited to the total available capacity of the line minus the value of extant HQICCs….") (emphasis added).

[19] *Id.*, *citing* October 31 Order, 117 FERC ¶ 61,132 at P 43.

[20] *Id.* at 18-22, *citing Alamito Co.*, 43 FERC ¶ 61,274 at 61,753 (1988).

[21] *Id.* at 19.

18. According to ISO-NE, NSTAR had ample opportunity to intervene in those proceedings, but chose not to, therefore NSTAR's complaint is barred.[22] ISO-NE maintains that allowing NSTAR to raise its concerns after having the opportunity during the FCM Settlement proceeding and the transition rules proceeding would be prejudicial to parties that participated in those proceedings and would create significant risk that the settled expectations of these parties would be adversely impacted. Further, ISO-NE contends that NSTAR's complaint is an untimely and impermissible request for rehearing of those two proceedings.

19. ISO-NE alleges that NSTAR has not met its burden under section 206 of the Federal Power Act (FPA) to show that the existing practice is unjust and unreasonable and that its proposed alternative is just and reasonable. Further, ISO-NE, NEPOOL and HQUS maintain that the FCM Settlement is clear that the standard of review for changes to section 11, part VIII, pertaining to the transition period, is the public interest standard of review.[23] According to ISO-NE, NSTAR argues that the public interest standard of review does not apply because its proposal is consistent with the April 16 Order, which ISO-NE disagrees with. ISO-NE also states that how the transition mechanism should be implemented is explicitly addressed by the FCM Settlement and the settlement narrowly confined the public interest standard of review to two aspects, one of which was the transition mechanism.

20. ISO-NE maintains that NSTAR does not present any data to support its contention that the contested tariff provisions actually create harm, but merely makes unsupported claims that section I.2.2(o) of the ISO-NE tariff had no financial impact, but now it does. ISO-NE also contends that NSTAR has not supported its assertion that the contested provision is confiscatory or why its proposed changes will not result in double recovery of payments for providing transmission reservations.

21. Finally, ISO-NE states that NSTAR's complaint is more appropriately addressed through a filing under section 20A of the ISO-NE tariff, which allows Interconnection Rights Holders to seek recovery of opportunity costs related to offset potential losses of HQICCs due to netting through section 205 of the FPA. According to ISO-NE, this would allow NSTAR to seek its desired result without collaterally attacking Commission orders or upsetting the delicate balance reached in the FCM Settlement Agreement.

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[22] ISO-NE July 30, 2007 Answer at 22-23, *citing Grynberg v. Rocky Mountain Natural Gas Company*, 90 FERC ¶ 61,247 at 61,826 (2000).

[23] FCM Settlement § 4.C; *see also* June 16 Order, 115 FERC ¶ 61,340 at P 172.

22. The Massachusetts Attorney General supports NSTAR's complaint, asserting that Interconnection Rights Holders continue to pay for all of the support costs of the interconnection with Hydro Québec. The Attorney General maintains that customers should not be required to bear unjustly the cost of the loss of the value of HQICC revenues without full compensation. Further, the Attorney General agrees with NSTAR that the principle applied in the April 16 Order limiting the amount of import capacity contracts clearing in the forward capacity auction to the amount that can be accommodated on the HQ Interconnection without reducing HQICCs should be applied to the treatment of HQICCs during the transition period.

23. IRH Committee urges the Commission in this proceeding to apply its well established policies regarding HQICCs. It asserts that the Commission has made clear that: (1) the Interconnection Rights Holders have a right to the HQICCs; (2) the Interconnection Rights Holder's right to receive HQICCs is based on the fact that the HQ Interconnection provides a reliability benefit to New England and is paid for by the Interconnection Rights Holders, and HQICCs are thus a form of compensatory value to the Interconnection Rights Holders and their respective ratepayers; (3) the value of the HQICCs cannot, either directly or indirectly, be taken from the Interconnection Rights Holders and socialized among market participants that do not pay for the interconnection; and (4) the reliability benefit of the HQ Interconnection is based not on the need for generation capacity in New England but on access to available generation in Canada.[24]

24. IRH Committee argues that the Commission's well-established policy is that the value of HQICCs should flow to the retail customers who pay for the reliability benefits provided by the HQ Interconnection. Also, because the Interconnection Rights Holders have an irrevocable obligation to pay for all of the support costs of the HQ Interconnection, they are entitled to the benefits of the HQ Interconnection, including HQICCs.[25]

25. In its answer, NSTAR maintains that its complaint is not barred by the FCM Settlement. While NSTAR does not dispute that the clear intent of the FCM Settlement is to require reductions should the Interconnection Rights Holders voluntarily allow capacity imports in excess of 600MW, it argues that Interconnection Rights Holders have the right to limit such capacity imports under Commission precedent. NSTAR asserts that it proposes the ISO-NE tariff change solely because ISO-NE will not interpret the

[24] *PG&E National Energy Group v. ISO New England Inc.*, 99 FERC ¶ 61,187 at P 20 (2002).

[25] *ISO New England, Inc.*, 120 FERC ¶ 61,087 at P 92.

tariff consistent with Commission orders. Further, NSTAR contends that allowing reductions in HQICCs was not included in the negotiated principles upon which the settlement vote was taken. NSTAR notes that ISO-NE, NEPOOL and HQUS all agree that the purpose of Part VIII.K was to continue the existing treatment of HQICCs in the transition period, but contends that the existing treatment was to prohibit netting of HQICCs.

26. NSTAR again argues that the Commission has found that the FCM settlement may be construed consistent with the rights of HQICC holders. It states that the Market Rule on which Part VIII.K of the FCM Settlement was based has been set aside by the April 16 Order. According to NSTAR, the provisions in the settlement that are predicated on preexisting rules must be read in the light of the current status of such rules. Therefore, NSTAR maintains that, because the Commission held that section I.2.2(o) of the ISO-NE Tariff cannot be read to allow capacity imports greater than the difference between the total transfer limit of the HQ Interconnection, the FCM Settlement cannot be inconsistent with the Market Rules.

27. NSTAR also states that ISO-NE, NEPOOL and HQUS are incorrect that NSTAR did not bring its claim in a timely manner. NSTAR asserts that once ISO-NE's tariff interpretation became apparent, it made clear its opposition to the transition rules in its comments to the FCM implementation rules.[26] Further, NSTAR maintains that it first brought its proposed changes through the NEPOOL stakeholder process to change Market Rule 1 to conform to Commission policy concerning HQICCs.

28. NSTAR also disagrees with ISO-NE and NEPOOL that the complaint is subject to the *Mobile-Sierra* public interest standard of review. According to NSTAR, parties to a contract or settlement cannot deprive a non-party of its rights under section 206 of the FPA. Further, even if the *Mobile-Sierra* public interest standard of review applies, NSTAR maintains that when the challenge is to prices that are too high, the public interest standard is satisfied by a showing that prices to ratepayers would be unjust and

[26] "NSTAR appreciates that a netting provision is currently in Market Rule 1. That provision is wrong, is inconsistent with Commission precedent, and NSTAR will avail itself of NEPOOL processes to ensure that the netting provision is eliminated or modified in a manner that protects the value of HQICC for native load customers." NSTAR March 8, 2007 Intervention and Protest, Docket Nos. ER07-564-000 and ER07-547-000 at 11.

unreasonable.[27] According to NSTAR, the Commission made this finding in the context of the FCM itself and should affirm its decision with respect to the transition period.

29. Finally, NSTAR maintains that ISO-NE, NEPOOL and HQUS do not show why ratepayers would benefit if the Commission rejects NSTAR's complaint, especially when the Commission previously found that ratepayers would be harmed by allowing capacity imports to displace HQICCs.[28] According to NSTAR, no benefits offset this harm. NSTAR contends that the transitional provision to displace HQICCs cannot be justified as a bridge to a new structure. HQICCs will be preserved under the FCM and thus taking them away during the transition cannot be justified on the grounds that it will gradually accustom NEPOOL participants to operation under the FCM.

30. In their answer, ISO-NE and NEPOOL ask the Commission to deny NSTAR's request for leave to answer. ISO-NE and NEPOOL argue that the FCM Settlement clearly intended to provide for reductions in HQICCs when capacity imports exceed 600 MW. Further, ISO-NE and NEPOOL state that NSTAR mischaracterizes how HQICCs are currently treated and that the tariff rules that preceded the FCM Settlement provided clearly that the HQICCs for an Interconnection Rights Holder are reduced whenever its share of the HQ Interconnection transfer capability is committed or used by it for a capacity transaction. According to ISO-NE and NEPOOL, the transition rules were intended to maintain this status quo.

31. ISO-NE and NEPOOL also maintain that NSTAR mischaracterizes their arguments about NSTAR's untimely challenge to Market Rule 1 in focusing solely on its efforts since the debate over the design of the FCM. ISO-NE and NEPOOL contend that NSTAR's efforts do not justify NSTAR's untimely challenge to the June 16 and October 31 Orders. Finally, ISO-NE and NEPOOL argue that NSTAR improperly challenges the application of the public interest standard of review to the complaint.

**Discussion**

32. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to

[27] NSTAR August 17, 2007 Answer at 7, *citing Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 471 F.3d 1053 (9th Cir. 2006) (*Snohomish*), *petition for cert. filed* No. 06-1468 (May 3, 2007).

[28] NSTAR August 17, 2007 Answer at 7, *citing* April 16 Order at P 168.

Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R § 385.214(d) (2007), the Commission will grant Northeast Utilities' late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

33. The Commission denies NSTAR's complaint. First and foremost, the complaint is a collateral attack on both the Commission's June 16 and October 31 Orders. NSTAR had the opportunity to raise its concern with the provision regarding HQICCs both when it was filed as a part of the FCM Settlement and when ISO-NE made its section 205 filing implementing the transition period rules. The Commission notes that NSTAR participated in the FCM Settlement proceeding, but chose not to raise concern with regard to HQICCs. Further, NSTAR chose not to participate in the transition rules proceeding in which the Commission conducted its review of the HQICC transition rules under section 205 of the FPA. We will not allow NSTAR to attack provisions on complaint when it failed to raise its concerns in the two prior relevant proceedings. Collateral attacks on final orders and relitigation of applicable precedent, especially by parties that were active in the earlier case, thwart the finality and repose that are essential to administrative efficiency, and are therefore strongly discouraged.[29] The Commission finds this particularly true with respect to the FCM Settlement and the tariff provisions arising from that settlement, given that they represent "difficult compromises among the diverse parties to [the FCM Settlement] proceeding that, if found just and reasonable, should be honored."[30] The Commission found these provisions, including the provisions related to HQICCs in the transition period, just and reasonable and, therefore, will honor them.

34. We disagree with NSTAR that the April 16 Order acting on the Market Rule 1 revisions to implement the FCM settlement in the implementation phase superseded the October 31 Order's acceptance of the section 205 filing that contained the HQICC

[29] *See, e.g., Entergy Nuclear Operations, Inc. v. Consolidated Edison Company of New York, Inc.*, 112 FERC ¶ 61,117 at P 12 (2005). *Cf. Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 407 (D.C. Cir. 2005) (denying a petition for review of a Commission determination to uphold a settlement even when a different proposal could have brought benefits because parties "might hesitate to enter rate settlements if a subset of settling parties could later pull the rug out from under them").

[30] June 16 Order, 115 FERC ¶ 61,340 at P 66.

provision for the transition period. The FCM Settlement contained two distinct time periods – the transition period and the implementation phase.[31] Different rules pertain to each and ISO-NE submitted separate tariff filings for each. The tariff provisions accepted in the April 16 Order relate to the implementation phase of the FCM Settlement and do not supersede tariff provisions pertaining to the transition period.

35. Further, we disagree that NSTAR's proposal put forth here is consistent with the FCM Settlement. Section III.8.3.7.2.1(e) of the ISO-NE tariff, which is applicable to the transition period and which NSTAR seeks to modify, states, in pertinent part (emphasis added):

> The remaining 600 MW of transmission may be used for UCAP over the Phase I/II HVDC-TF interconnection by any Market Participant that arranges for transmission over the interconnection without reductions in the Hydro Quebec Interconnection Capability Credits. UCAP above 600 MW may be transmitted only in those months when the Hydro Quebec Interconnection Capability Credits are 1,200 MW and *will result in a like*

[31] As noted elsewhere in this order, the FCM Settlement distinguishes between the transition period and the subsequent implementation phase, providing different rate treatments for the two different periods. There is nothing inherently inappropriate in the FCM Settlement's doing so, or in the Commission's allowing so. Transition mechanisms of one form or another are an accepted practice in the face of industry and regulatory changes. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 699-700, 704 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *accord*, *e.g.*, *PJM Interconnection, LLC*, 119 FERC ¶ 61,318 at P 85 (2007); *California Independent System Operator Corp*., 119 FERC ¶ 61,076 at P 19 (2007); *Midwest Independent Transmission System Operator, Inc*., 104 FERC ¶ 61,105 at P 49-50, *order on reh'g*, 105 FERC ¶ 61,212 at P 38, 43 (2003). Indeed Order No. 888's stranded cost recovery provisions were just such a transition mechanism. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 61,789-90, 61,794 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). Thus, the FCM Settlement can and does include such mechanisms. *ISO New England, Inc*., 119 FERC ¶ 61,044 *passim* (2007).

> *reduction in the total Hydro Quebec Interconnection Capability Credits* available for the holders of those credits.

This provision specifically allows reductions in HQICCs. Contrary to NSTAR's claim, this section does not authorize placing a limit on the UCAP above 600 MW. In contrast, section 11, part III.B.3.b of the FCM Settlement, which is applicable to the implementation phase states, in pertinent part:

> The total amount of accepted Import Bids over the Phase I/II tie plus approved HQICCs cannot exceed the approved Phase I/II transfer limit. If the accepted Import Bids exceed the difference between the approved Phase I/II transfer limit and the approved MW of HQICCs (the "HQI Excess"), the capacity requirement for those [Interconnection Rights Holders] or their designees that sold their transmission rights for the subject period will be increased by the difference between the total amount of accepted Import Bids and the HQI Excess. These capacity requirement increases will be allocated among the IRH or their designees in a manner to be determined by the [Interconnection Rights Holders].

Thus, for the two separate time periods, two separate and different provisions are applicable. Indeed, both ISO-NE and the Commission have stated that the transition period and the later implementation phase are intended to be substantially different.[32] While NSTAR is correct that the Commission found that section 11, part III.B.3.b of the FCM Settlement does not prohibit limiting the capacity, section 11, part III.B.3.b concerns the later FCM implementation phase, not the transition period. Further, whereas section III.8.3.7.2.1(e) of the ISO-NE tariff specifically permits the remaining 600 MW of transmission to be used for UCAP, section 11, part III.B.3.b allows reduction of HQICCs only "if" capacity sold exceeds the excess capacity.

36. Further, we disagree with NSTAR that its proposal would not require a public interest showing pursuant to the *Mobile-Sierra* doctrine. The FCM Settlement states (emphasis added):

> From the Effective Date, absent the agreement of all Settling Parties to the proposed change, the standard of review for: … (ii) *proposed changes to section 11, Part VIII below (Agreements Regarding Transition Period) and the Market Rules implementing that part, shall be the "public interest" standard of review* set forth in *United Gas Pipe Line Co. v. Mobile Gas*

[32] *See* October 31 Order, 117 FERC ¶ 61,132 at P 43.

> *Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the "Mobile-Sierra" doctrine), whether the change is proposed by a Settling Party, a non-Settling Party, or the FERC acting *sua sponte*.[33]

37. In this regard, we disagree with NSTAR that the parties to the FCM Settlement "deprived the section 206 rights of a non party."[34] Nothing in the FCM Settlement prohibits either a party or a non-party to the settlement from making a filing exercising its section 206 rights. The FCM Settlement merely requires anyone filing a complaint under section 206 of the FPA to meet the public interest standard of review if it is to prevail on the merits. As discussed in detail in the June 16 Order, we found the *Mobile-Sierra* provision consistent with Commission policy;[35] in that order, the Commission noted that it has routinely permitted the use of similar provisions in settlement agreements, including contested settlements.[36] Moreover, as the Commission has stated on several recent occasions, "there is no Commission or court precedent that supports a finding that a non-signatory may unilaterally seek changes to a *Mobile-Sierra* 'public interest' contract under the 'just and reasonable' standard of review."[37] Therefore, although NSTAR was not a party to the FCM Settlement, it is nevertheless bound by the public interest standard of review when requesting changes to the FCM Settlement or changes to the tariff provisions implementing the FCM Settlement.

38. NSTAR notes that a party argued on rehearing of the April 16 Order that the Commission should not have changed the HQICC provision relating to FCM implementation because the public interest standard of review applied to that provision. The situations presented in the April 16 Order and in this proceeding are different in several respects. First, we disagree with NSTAR that the changes ordered in the April 16 Order were made pursuant to the public interest standard of review. In the April 16

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[33] FCM Settlement, § 4.C.

[34] NSTAR August 17, 2007 Answer at 7.

[35] June 16 Order, 115 FERC ¶ 61,340 at P 182-185, *order on reh'g*, 117 FERC ¶ 61,133 at P 88-95.

[36] June 16 Order, 115 FERC ¶ 61,340 at P 183.

[37] *Id. See also Pennsylvania-New Jersey-Maryland Interconnection*, 108 FERC ¶ 61,032 at P 7(2004), *citing Public Utilities Commission of the State of California*, 105 FERC ¶ 61,182 at P 50 (2003).

Order, the Commission required ISO-NE to make the changes to the HQICC provision that it filed pursuant to section 205 of the FPA, not section 206.[38] We noted that, unlike in the current proceeding in which NSTAR has requested relief under section 206 of the FPA,[39] our directive was in response to protests objecting to ISO-NE's section 205 filing. As we stated on rehearing of the April 16 Order, under section 205, it was ISO-NE's burden to demonstrate that its proposed rules were just and reasonable, and, in light of the protests, we found that ISO-NE had not met that burden with regard to its proposed HQICC implementation rules.[40] However, in this proceeding NSTAR is contesting the provision under section 206 of the FPA. Further, in both the FCM Settlement proceeding and the section 205 proceeding accepting the transition rules, the Commission specifically approved ISO-NE's proposed application of the public interest standard of review to changes to the ISO-NE tariff provisions implementing the transition period, especially since the relevant rules would only be in place temporarily until the FCM begins.[41]

39. NSTAR also maintains that, under *Snohomish*, the public interest standard of review is satisfied by a showing that prices to ratepayers would be unjust and unreasonable. The Commission disagrees with that claim. In *Snohomish*, the court made clear that application of the public interest review under *Mobile-Sierra* does not permit a challenge to a contract simply because it is no longer favorable.[42] Further, in *Northeast Utilities*,[43] the First Circuit Court of Appeals remanded a case in which the Commission considered modifications to a power contract pursuant to the just and reasonable standard of review even though the contract required changes to be made only under the public

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[38] *ISO New England, Inc.*, 120 FERC ¶ 61,087 at P 91.

[39] *See* NSTAR July 9, 2007 Complaint at 1.

[40] *ISO New England, Inc.*, 120 FERC ¶ 61,087 at P 91.

[41] *Devon Power*, 118 FERC ¶ 61,133 at P 89(2007).

[42] *Snohomish*, 471 F.3d at 1060, n.7 (holding that under *Mobile-Sierra*, "lack of profitability alone is not a basis for deeming a contract unreasonable when the seller has agreed to the rate that proves unprofitable"). *See also PEPCO v. FERC*, 210 F.3d 403, 409 (D. C. Cir. 2000) ("FERC precedent makes clear that the fact that a contract has become uneconomic to one of the parties does not necessarily render the contract contrary to the public interest.").

[43] *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993).

interest standard of review. There, the court said that the Commission "conflate[d] the 'just and reasonable' and 'public interest' standards, thereby circumventing the Mobile-Sierra doctrine,"[44] which the court said is "a more difficult standard for the Commission to meet than the statutory 'unjust and unreasonable' standard of section 206."[45]

40. The Commission finds that NSTAR has not met its burden under the "public interest" standard of review to justify the modification of the tariff provision at issue in this proceeding. However, even if the public interest standard of review did not apply, and the relevant standard of review was the just and reasonable standard of review, we believe the tariff provision is just and reasonable in the context of the FCM Settlement package.[46] Indeed, the Commission approved the settlement, expressly finding it just and reasonable.[47]

41. NSTAR has not demonstrated that the HQICC transition provision has become unjust and unreasonable. The fact that the Commission in the April 16 Order required ISO-NE to modify its proposal for the implementation phase so that the maximum amount of import capacity contracts accepted in the auction over the HQ Interconnection are limited is not persuasive. Our directive in the April 16 Order did not disrupt the FCM Settlement package. We specifically stated that:

> Until and unless the Commission changes its ruling, [the provision relating to HQICCs in the implementation phase] will remain theoretical. Nevertheless, *it will remain in place* and will take effect if the Commission

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[44] *Id.* at 961.

[45] *Id.* at 960; *accord Wisconsin Public Power, Inc. v. FERC*, No., 04-1414 (D.C. Cir. July 20, 2007) (describing the public interest standard as "much more restrictive" than the just and reasonable standard); *ExxonMobil Corp. v. FERC*, 430 F.3d 1166, 1177 (D.C. Cir. 2005) (describing the public interest standard as "a heavy burden").

[46] *See* June 16 Order, 115 FERC ¶ 61,340 at P 2 ("In this order, we accept the proposed Settlement Agreement, finding that as a package, it presents a just and reasonable outcome for this proceeding consistent with the public interest.")

[47] *Id.*; *see also id.* at P 66 (noting that the FCM Settlement "resolves all of the outstanding issues in a difficult, contentious and lengthy matter," "represents difficult compromises among the diverse parties to this proceeding that … should be honored," and "bring[s] a needed measure of stability and allow New England to move forward on other market enhancements.").

should change its ruling with regard to capacity contracts accepted in the auction. Thus, it is inaccurate to state that the Commission's ruling changes, or is contrary to, section 11, Part III.G.D.b.[48]

The Commission orders:

NSTAR's complaint is hereby denied, as discussed in the body of this order.

By the Commission. Commissioners Kelly and Wellinghoff concurring with separate statements attached.

( S E A L )

Kimberly D. Bose,
Secretary.

[48] *ISO New England, Inc.*, 120 FERC ¶ 61,087 at P 90.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

NSTAR Electric Company Docket No. EL07-81-000
v.
ISO New England, Inc.

(Issued September 21, 2007)

KELLY, Commissioner, *concurring*:

In this complaint proceeding, NSTAR seeks changes related to the transition mechanism established in accordance with the Forward Capacity Market (FCM) Settlement approved by the Commission in *Devon Power LLC*.[1] The FCM Settlement contains a provision requiring that future changes to the transition mechanism would be subject to the *Mobile-Sierra* "public interest" standard of review, including any changes proposed by a non-settling party or the Commission acting *sua sponte*. This order relies, in part, on the rationale stated in *Devon Power LLC* to conclude that the "public interest" standard applies to NSTAR's requested changes. In my concurrences in *Devon Power LLC*, I explained why I thought it was appropriate, under the circumstances, to approve the "public interest" standard provision, and noted my disagreement with some of the order's rationale for approving this provision. For the reasons set forth in those concurrences, I agree with the finding in today's order that, although NSTAR is not a party to the FCM Settlement, it must meet the "public interest" standard of review when requesting changes to the settlement.

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Suedeen G. Kelly

[1] 115 FERC ¶ 61,340 (2006), *order on reh'g*, 117 FERC ¶ 61,133 (2006).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

NSTAR Electric Company Docket No. EL07-81-000
v.
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(Issued September 21, 2007)

WELLINGHOFF, Commissioner, concurring:

Today's order on NSTAR's complaint against ISO-NE is closely related to the Commission's previous approval of the contested settlement pursuant to which ISO-NE is creating the Forward Capacity Market (FCM). While the initial order approving that settlement issued before I joined the Commission,[1] I concurred with the Commission's subsequent order on rehearing.[2] Among many issues in the Rehearing Order, the Commission addressed the applicability of the "public interest" standard of review.[3]

I wrote separately with regard to the Rehearing Order to explain my conclusion that in the narrow circumstances requested by the parties, it is appropriate to apply the "public interest" standard to future changes to the settlement sought by a non-party or the Commission acting *sua sponte*. I stated that the Commission has discretion to agree to apply the "public interest" standard to future changes sought by non-parties or the Commission acting *sua sponte*, and should exercise that discretion based on careful consideration of the interests of parties and non-parties. More specifically, I stated that I had identified standards in *Entergy Services, Inc*.[4] against which such requests for application of the "public interest" standard should be measured, and that the facts presented in connection with the FCM settlement satisfied those standards.

The Commission states in today's order that the provision of the FCM settlement regarding the applicability of the "public interest" standard is consistent with Commission policy, and that the Commission has "routinely permitted the use of similar provisions in settlement agreements, including contested settlements." I note that,

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[1] *Devon Power LLC*, 115 FERC ¶ 61,340 (2006).

[2] *Devon Power LLC*, 117 FERC ¶ 61,133 (2006) (Rehearing Order).

[3] *Id*. at P 77-95.

[4] 117 FERC ¶ 61,055 (2006) (*Entergy*).

because of failures to satisfy the standards that I identified in *Entergy*, I have frequently dissented from orders in which the Commission has agreed to apply the "public interest" standard to future changes sought by a non-party or the Commission acting *sua sponte*. However, based on the language of the FCM settlement and the reasoning set forth in my concurrence to the Rehearing Order, I agree with the Commission's that although NSTAR was not a party to the FCM settlement, it must satisfy the "public interest" standard of review when requesting changes to that settlement.

For these reasons, I respectfully concur with today's order.

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Jon Wellinghoff
Commissioner